Supreme Court, U.S.
FILED
JUL 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2088

In The

Supreme Court of the United States

October Term, 1988

FRANK TILLER,

Petitioner,

vs.

WILLIE ALBERT FLUDD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether inquiry pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986) may be made by the district court of the official County Attorney representing the Petitioner-Defendant Deputy Sheriff, where there has been a *prima facie* showing that the County Attorney based peremptory challenges on the race of the Plaintiff-Respondent in his claim for violation of constitutional rights?

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Respondent Willie Albert Fludd opposes the Petition for Writ of Certiorari of Petitioner Frank Tiller.

STATEMENT OF THE CASE

I. Jurisdiction and Parties

The Petition for Writ of Certiorari was received June 23, 1989.

The Plaintiff below and Respondent herein is Willie Albert Fludd. Plaintiff was represented by John P. Batson and Sam G. Nicholson. The Petitioner, Frank Tiller, was sued individually and in his official capacity as an officer

with the Richmond County Sheriff's Department. The Sheriff of Richmond County, James Beck, an elected county officer, was named as a Defendant in his individual and official capacity in this claim pursuant to Title 42 U.S.C. § 1983 for violation of Plaintiff's fourth and fourteenth amendment rights. The Defendants were represented by the official County Attorney, Robert C. Daniel, Jr.

II. Statement of Facts

Discriminatory Strikes

The facts regarding *voir dire* and striking procedure are accurately stated in the Court of Appeals decision, which is reprinted in the Petition for Certiorari as Appendix I. The portion of the decision relevant to a *prima facie* showing of a *Batson v. Kentucky*, 476 U.S. 79 (1986) violation is at A5-6.

The panel opinion inappropriately concluded that "Appellant's proof failed to satisfy the *Swain* [*v. Alabama*, 380 U.S. 202 (1965)] standard . . . ." A17. No proof was offered or considered by the district court beyond the *prima facie Batson* proffer, whether in the nature of *Swain* or *Batson* evidence, because the district court rejected the applicability of *Batson* to civil cases. (A6; 1SR3-5, 6).

Incident from which Case Arose

The statement of facts in the Court of Appeals decision about the incident from which this case arose is sufficient to consider the question presented. A5.

III. Decisions of the District and Appellate Courts

The representations of the decisions below by Petitioner are accurate with the exception of stating that the Court of Appeals "determined that all of the other allegations of error made by the respondent were without merit." Petition for Certiorari at 3. The decision in *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989) did not address Plaintiffs-Respondent's objections to charge on fourth amendment grounds carried forward by appeal. The position taken in objection was recently affirmed in *Graham v. Connor*, ___ U.S. ___, 57 U.S.L.W. 4513 (May 15, 1989).

The issue raised on appeal challenged the district court's failure to give a fourth amendment charge, or in giving a charge which did not reflect appropriate fourth amendment principles. Brief of Appellant at 33, *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989). (No. 87-8244).

The district court found the case should only go to the jury on a fourteenth amendment claim. (1SR3-424). In charging the jury the district court required that the force be "grossly disproportionate . . . and intentional . . . ." (1SR3-457, 458, 460). The district court charged that the jury's decision must be "based on his [the Defendant-Petitioner's] state of mind." (1SR3-463).

Although counsel did not articulate the precise admonition of the language in *Graham v. Connor*, ___ U.S. ___, 57 U.S.L.W. 4513, 4517 n.11 (May 15, 1989) against applying the factors of *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973) in a "talismanic fashion", counsel stated the substance of such an objection. (1SR3-470). Further, counsel submitted an appropriate charge. ("[A]n officer is entitled to use such force as a

reasonable person would think is required . . . .") (Plaintiff's Charges, Unreasonable Force).

On appeal Plaintiff-Respondent argued that charging the *Johnson* factors as elements was error. "The three elements approach [of the *Johnson* factors by] . . . the District Court required proof of specific intent or grossly excessive force, instead of just excessive force . . . ." (Brief of Appellant at 33, *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989). (No. 87-8244).

The panel opinion in *Fludd* does not address the challenged charge or lack thereof. Denial of the rehearing was entered on March 31, 1989. This Court issued its opinion in *Graham v. Connor, supra*, on May 15, 1989.

Respondent's counsel will address this issue pursuant to FED. R. CIV. P. 60(b)(6) by motion with the district court. *Ritter v. Smith*, 811 F.2d 1398, 1400-05 (11th Cir. 1987); *Gaines v. Dougherty County Board of Education*, 775 F.2d 1565 (11th Cir. 1985).

REASONS FOR DENYING THE PETITION

I. Although *En Banc* Rehearing in *Edmonson*, Still No Decision In Conflict with Application of *Batson v. Kentucky* to Civil Cases Requiring Rule 17.1(a) Review.

Although on June 19, 1989, the *en banc* Fifth Circuit heard oral argument in rehearing *Edmonson v. Leesville Concrete Company*, 860 F.2d 1308 (5th Cir. 1988) (prohibition against court's imprimatur of the discriminatory use of peremptory challenges applies in all civil cases), Peti-

tioner has presented no case in conflict with *Fludd v. Dykes, supra,* which meets Rule 17.1(a) standards.

II. Petitioner's Asserted General Grounds Insufficient to Grant Certiorari under Rule 17.1(c).

In the Petitioner's Brief at pages 7-19 he argues a patchwork of authority to assert a general ground for granting the Petition pursuant to Rule 17.1(c). The nature and tenor of his argument why *certiorari* should be granted on the issue of whether *Batson* applies to civil cases is best portrayed by his own words.

> [I]n civil cases a litigant's due process right to the assistance of counsel and the attorney's right to pursue his calling and his First Amendment rights of personhood, privacy and freedom of speech and association mandate that the *Batson* decision be held inapplicable to such proceedings. *Any expectancy that a party has in a money judgment or in injunctive relief cannot possibly override such fundamental interests on the part of his adversary and his adversary's attorney.* Such a weighing of opposing interests is particularly appropriate when it is considered that peremptory strikes have traditionally been exercised in a manner solely within the discretion of respective counsel and that they are not a constitutionally mandated component of jury selection in civil cases in any event.

Petition for Certiorari at 18 (citations omitted) (emphasis added).

The Petitioner's argument guts the principle that the judicial system is to be fair to both parties. Essentially he argues for gunslinger justice in which the judge and the rule of law play no active part to insure the draw is fair. Further, the Petitioner's citation of *Swain v. Alabama,* 380

U.S. 202 (1965), partially overruled in *Batson v. Kentucky*, 476 U.S. 79 (1986); and *Hayes v. Missouri*, 120 U.S. 68 (1887) to support the argument, is incorrect. These cases do not hold that the fourteenth amendment does not apply to civil cases, claims for money or constitutional claims. Instead, they stand for the *Shelley v. Kraemer*, 334 U.S. 1 (1948) line of reasoning that courts ought to affirmatively use their power and procedure in a manner fair to both parties, as prescribed by the constitution. The Eleventh Circuit followed this reasoning in the case at bar.

The bulk of the Petitioner's argument asking this Court to grant *certiorari* is based upon a general truth that the use of peremptory strikes is important to our judicial system. However, the importance of peremptory strikes alone does not justify assertion of this Court's *certiorari* discretionary jurisdiction.

The false premise of the Petitioner's position is that in civil litigation, one party and his or her attorney should be left alone to his or her devices, and thus fairness, as embodied by the fourteenth amendment, is relegated to a secondary position. The Petitioner's argument is wholly insensitive to the idea that the judicial branch of government should provide a forum in which each party is treated fairly and not subjected to unequal treatment on prohibited grounds. If not used fairly, a peremptory strike becomes the Achilles heel which effectively nullifies every law and constitutional principle ever mandated. Given the context of this constitutional claim by a minority against an agent for the state, accepting the Petitioner's position would leave no buffer between a citizen's constitutional rights and government abuse.

Nowhere does the Petitioner cite any authority from this Court or any circuit court which has arguably addressed the conflict between the Petitioner's contrived due process and first amendment theory as a whole, with the principle of a fair judiciary. Rather, Petitioner has amassed a number of cases and their principles to proffer a theory untested in the context of the issues of this case. Moreover, the Petitioner presented no cases affirmatively preventing a counsel from having to explain the use of his or her strikes. For example, Petitioner cited *Martin v. Lauer*, 686 F.2d 24 (D.C. Cir. 1982), and although it dealt in general with attorney-client communication, the case is inapposite in the context of the discriminatory use of strikes.

The Petitioner further asserts that any inquiry into the jury selection process is forbidden, but this contention contravenes the well-established role of the court to oversee the entire trial including the jury selection process. The Petitioner's argument renders the constitution and principles of a fair judiciary subservient to one litigant's attorney-client privilege and his counsel's "personhood." What appears to be at the heart of the Petition is the "risk [of] being labeled a bigot or a fraud or both." Petition for Certiorari at 13.

Procedurally this case is not ripe to address the substance of the objections to a possible *Batson* inquiry. The Petition reads as if there had been a *Batson* inquiry in the district court and the Petitioner or his attorney had lodged certain objections or asserted a privilege and refused to answer the inquiry. However, there is no record from which to evaluate the Petitioner's argument either on the facts, or in the courts' rulings.

While peremptory strikes are admittedly a critical stage in the judicial process, the general grounds and lack of development of the record on these novel, general grounds asserted by the Petitioner are not sufficient to cause the writ to be issued pursuant to Rule 17.1(c). Either courts are to follow the fourteenth amendment or they are not.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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